



U.S. Department of Justice
Civil Division, Federal Programs Branch
20 Massachusetts Avenue NW
Washington, DC 20530

By ECF

August 15, 2018

The Honorable Jesse M. Furman
United States District Judge
Southern District of New York
Thurgood Marshall Courthouse
40 Foley Square
New York, New York 10007

Re: *State of New York, et al., v. U.S. Department of Commerce, et al.*, 18-cv-2921 (JMF)
N.Y. Immigration Coalition v. U.S. Dep't of Commerce, 18-cv-5025 (JMF)

Dear Judge Furman:

Pursuant to Local Rule 37.2 and Individual Practice 2.C, Defendants write to oppose Plaintiffs' request for a conference or an order compelling the production of additional material, and to assure this Court that Defendants have taken seriously their obligation to produce supplemental materials in response to this Court's July 3, 2018 Order. Plaintiffs' claim that "conspicuous omissions from the Administrative Record" exist is meritless.

Defendants have produced more than 11,000 pages in response to this Court's order. *See* ECF Nos. 212, 216, 222, No. 18-cv-2921. Plaintiffs have scoured those documents in search of errors, yet come up almost entirely short. Specifically, Plaintiffs raised with Defendants last week a single email in which James Uthmeier asked a newly appointed Commerce official if he could leave "review materials" in her office in advance of a meeting. *See* AR 1996 (attached as Ex. 4 to Plaintiffs' Fourth Mot. to Compel). Trial counsel were not immediately aware of what those "review materials" consisted of, or whether they still exist, but agreed to consult with the agency and update Plaintiffs. (Plaintiffs waited only two business days before filing their Fourth Motion to Compel).

As explained in the Declaration of James Uthmeier, attached as Exhibit A,¹ the review materials consisted of six produced documents and five inadvertently omitted, publicly available documents—two court cases, a printout of Title XIII itself, and two pages from the Census Bureau website—that Mr. Uthmeier used to brief the Commerce official on his legal research for Secretary Ross. Mr. Uthmeier located these hard-copy documents in a cabinet with other, unrelated documents in response to inquiries by trial counsel; they had been misplaced due to an office move. These materials contain highlights and markings reflecting Mr. Uthmeier's mental impressions and thus would not have been included in the supplemental materials in response to this Court's order but would instead have been logged as attorney-client privileged. Mr. Uthmeier believed these documents had already been collected and reviewed, and has since thoroughly searched and

¹ Due to technical problems, Defendants do not at this time have the two Declarations referenced in this letter in a form ready for upload. They will be uploaded within one hour from filing of this letter. We apologize to the Court for this inconvenience.

re-searched his office to ensure that no additional responsive physical documents exist. *See* Uthmeier Decl. at 2. Publicly available copies of these materials are attached to Uthmeier's Declaration as Exhibits 1-5, and the copies containing Mr. Uthmeier's mental impressions have been added to Defendants' privilege log. These materials were not intentionally or negligently omitted from Defendants' productions, and are certainly not indicative of a broader issue with regard to Defendants' compliance with this Court's order.

Plaintiffs' assertion that "[t]his instance illustrates a broader concern ... regarding conspicuous omissions from the Administrative Record" is baseless. *See* Pls.' Fourth Mot. to Compel, at 3. Plaintiffs point to evidence in the record of conversations between Commerce officials and various third parties and complain of the lack of call notes or other writings memorializing the substance of those communications. *Id.* That such writings are not found within Defendants' production or privilege log does not indicate "gaps in the Administrative Record," *id.*, but simply that the participants in those calls did not take notes or otherwise memorialize their substance. Defendants cannot produce or log material that does not exist, and Plaintiffs' complaints about the completeness of the record rest on mere speculation and the contention that the record should contain all material Plaintiffs wish to find there.

In the interest of transparency and out of an abundance of caution, Defendants attach to this letter a declaration explaining in detail the agency's process in gathering documents for production—both in the original Administrative Record and in response to this Court's order—and confirming the completeness of those efforts. *See* Declaration of Michael Cannon, attached as Exh. B. The declaration further addresses the documents on which Plaintiffs rely and confirms that the officials involved in those calls did not memorialize those calls—in other words, no such records exist.

In sum, Defendants have taken all proper and reasonable steps to ensure that the administrative record and supplemental materials are complete. The result is an extensive and robust record by which Plaintiffs and the Court can assess the Secretary's decision. Plaintiffs have not come close to establishing that Defendants' efforts have been deficient or that there are "gaps" in the record. Defendants respectfully request that this Court deny Plaintiffs' Fourth Motion to Compel.

Respectfully submitted,

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